

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

Office of Administrative Law Judges  
721 19<sup>th</sup> St., Suite 443  
Denver, CO 80202-2500  
Office: (303) 844-5266/Fax: (303) 844-5268

December 30, 2015

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2015-552
Petitioner,	:	A.C. No. 11-03141-382619
	:	
v.	:	
	:	
MACH MINING LLC,	:	
Respondent.	:	Mine: Mach #1 Mine

**DECISION AND ORDER**

Appearances: Christopher Smith, United States Department of Labor, Office of the Solicitor, Nashville, TN, for Petitioner;

Christopher Pence, Hardy Pence, PLLC, Charleston, WV, for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (“the Act”). This docket involves eight citations issued pursuant to section 104(a) of the Mine Act with a proposed penalty of \$34,053.00. The parties have settled seven of the citations, leaving only Citation No. 9031549 for decision. The parties presented testimony and evidence regarding that citation at a hearing held in St. Louis, Missouri, on November 4, 2015.

**I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Mach #1 mine is an underground coal mine located in Johnson City, Illinois. The Mach #1 mine is operated by Mach Mining, LLC, (“Mach”) and is owned by Murray Energy. The parties have stipulated that Mach’s mining operations affect commerce and that it is an “operator” as defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d). Jt. Stips. ¶¶ 2, 4. The parties have also stipulated to the jurisdiction of the Mine Safety and Health Administration (MSHA) and the Commission. Jt. Stips. ¶¶ 3, 5. The parties agree that Mach is a large operator and that the proposed penalty of \$3,784.00 will not hinder its ability to continue in business. Jt. Stips. ¶¶ 8, 9.

Citation No. 9031549 was issued by Inspector Edward Law on April 14, 2015, pursuant to section 104(a) of the Act for an alleged violation of 30 C.F.R. § 75.220(a)(1), a failure to follow the mine’s roof control plan. The citation alleges that the operator of a continuous mining

machine was observed tramming the continuous miner between the second and third entries while standing in the “red zone” in violation of the mine’s roof control plan. The inspector determined that the condition was reasonably likely to result in a fatal injury, was significant and substantial, affected one person, and was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$3,784.00 for the alleged violation. The inspector also issued a 107(a) imminent danger order related to the citation, which has not been contested by the operator.

The findings of fact detailed below are based on the record as a whole and my careful observation of the witnesses during their testimony. My credibility determinations are based in part on my close observation of the witnesses’ demeanors and voice intonations. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration or the lack thereof, and consistencies and inconsistencies in each witness’s testimony and among the testimonies of the various witnesses. Any failure to provide detail on each witness’s testimony in this decision should not be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433,436 (8th Cir. 2000).

Based upon the parties’ stipulations, my review of the entire record, my observation of the demeanors of the witnesses, and consideration of the post-hearing briefs, I find that the Secretary has proven a violation, the S&S designation is appropriate, and the negligence is moderate, as alleged.

#### *MSHA’s Inspection*

Inspector Edward Law is a mine inspector who has been with MSHA since 2005. Prior to becoming an inspector, he worked for 23 years in the mining industry in a number of positions, including as a repairman for heavy equipment and continuous miners. Law has attended the required MSHA training and is a roof control specialist. As part of his duties as an inspector, he has inspected the Mach #1 mine on several occasions. The mine is a large underground coal mine that uses continuous mining machines to mine coal.

On April 14, 2015, Law visited the mine to conduct a six-month roof control evaluation. In the course of his inspection, Law was walking in the tailgate entry #3 when he heard a machine running. He turned the corner from entry #3 into crosscut #2 and observed the operator of a continuous miner tramming the machine by remote control in the crosscut from entry #3 to entry #2. The machine was approximately 60 feet from Law with its tail towards him. He observed that the operator, Miles Townsend, was positioned just past the machine’s cable hook on its tail. The tail was swung toward the rib, and Townsend was between the tail of the machine and the rib. Law flagged the operator with his cap light and verbally issued a 107(a) imminent danger order to the mine’s safety representative, Charles Harvey.<sup>1</sup> Law then spoke to the operator of the machine, telling him that he could not stand in that position because it placed him in the red zone. Law testified that the miner operator replied that he wasn’t thinking and didn’t normally stand in the red zone. Law understood those statements as an agreement that the operator had been standing in the red zone. Law then asked Harvey to confirm that the operator

---

<sup>1</sup> The imminent danger order has not been contested and therefore is a final order of the Commission.

had been in the red zone, but Harvey claimed that as soon as he heard Law issue the imminent danger order, he “zoned out” and did not remember anything. The machine was moved shortly after Law issued the order, so he was unable to take measurements. Law sketched a diagram of the scene later that day, which was admitted into evidence as Exhibit 7. As a result of his observations, Law issued Citation No. 9031549 for a violation of the mine’s roof control plan.

At hearing, Harvey testified that when Law verbally issued the imminent danger order, Harvey looked in the direction of Townsend to see whether he was in the red zone but could not tell from his vantage point. Harvey believed that the continuous miner was parked and turned off at the time of the alleged violation. Harvey and Townsend both indicated that a roof bolter was operating nearby at the time, which created noise that Law could have mistaken for the sound of the continuous miner. Townsend testified that he was not in the red zone, but rather behind the tail of the machine with the pump motor shut down when Law arrived. He stated that he was in the process of tramming the machine around a corner but had just turned off the pump to make sure the cable was not caught and the machine was not pulling on the ventilation curtain. When the pump is turned off, the machine has no hydraulic action and cannot move. Townsend said that he was standing behind the tail of the machine and had not yet turned the pump back on when he heard Law yell, at which point he left the machine and walked towards Law. The mine introduced a diagram illustrating Townsend’s account as Exhibit A. Finally, Townsend testified that when Law informed him that he was writing a citation, Townsend denied being in the red zone.

The accounts of the three witnesses differ dramatically as to the events surrounding the alleged violation. Law was certain that the continuous miner was tramming and that Townsend was next to the rib inside the tail of the machine. Townsend and Harvey recalled the machine being powered off, and Townsend recalled being behind the tail of the machine out of the red zone, while Harvey was unsure. I find Law to be a knowledgeable and credible witness and I credit his testimony on these issues. Law admitted that had the tail been straight, it would have been difficult to determine the operator’s exact location from his position sixty feet away. But because the tail was at an angle to the rib when Law observed it, he was confident of Townsend’s position.<sup>2</sup> Law was also confident that the machine was tramming when he observed it and that he was not mistaken that the noise he heard was the continuous miner. He also observed the continuous miner moving when he rounded the corner. I therefore credit his testimony on this issue. Finally, Respondent notes that Law failed to take measurements or otherwise investigate the violation after issuing the imminent danger order. Resp. Br. at 7-8. I do not find that fact to detract from Law’s credibility because the machine was moved after he issued the order, preventing him from taking accurate measurements.

---

<sup>2</sup> Respondent argues that Law was too far away to be able to discern Townsend’s position with respect to the continuous miner. Resp. Br. at 5-7. At hearing, Harvey described how he recreated the scene later with his manager and determined that it was impossible to tell whether a person was standing inby or outby the machine from a distance of sixty to eighty feet away. Tr. at 118. That re-creation, however, did not account for the fact that when Law observed Townsend, the tail of the machine was between the two men. I find that this arrangement allowed Law to accurately observe Townsend’s position from where Law stood.

### A. The Violation

Section 75.220(a)(1) requires that “Each operator shall develop and follow a roof control plan.” 30 C.F.R. § 75.220(a). In order to prove a violation of § 75.220(a)(1), the Secretary must establish, first, that the provision allegedly violated is part of the approved and adopted plan, and second, that the condition cited actually did violate the plan provision. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280 (Dec. 1998); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987).

The roof control plan for the Mach #1 mine requires that

The continuous miner shall be operated from a sufficient distance so that the miner operator will not be endangered by the continuous miner or the shuttle car. . . . While tramming the miner machine in the remote mode, all persons shall be in a safe location from the continuous mining machine so that miners will not be endangered.

Ex. 3 at 7. The plan then refers miners to a “red zone illustration.” *Id.* A red zone is an area that puts the miner in a position where he could be pinned or crushed by the machine as it moves. Miners are prohibited from being in those areas. The illustration indicates that when the machine is tramming, all areas between the sides of the machine and the ribs are part of the red zone. Ex. 3 at 9. The operator must stand well behind the continuous miner while it is tramming so as not to be endangered by the machine.

Law observed Townsend standing beside the tail of the continuous miner between the machine and the rib while the machine was tramming. This placed him in the red zone in violation of the roof control plan.

### B. Gravity, S&S, and Negligence.

The Secretary asserts that Mach’s violation created the reasonably likely risk of causing a fatal injury, that it was significant and substantial (“S&S”), and that it was the result of moderate negligence on the part of the operator. A “significant and substantial” violation is described in section 104(d)(1) of the Mine Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated S&S “if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

At the outset of the hearing, the parties agreed that if a violation occurred as described in the citation, the violation was significant and substantial and was the result of moderate negligence. Jt. Stips. ¶¶ 11-14. I have found a violation, and given that the miner was in the red zone, I agree that it created a very serious hazard. I find that the violation was reasonably likely

to cause a fatal injury and was significant and substantial. I also find that the moderate negligence designation was appropriate.

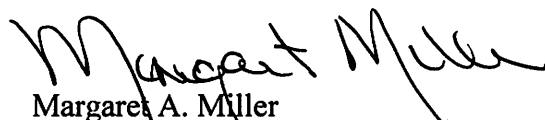
## II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that in assessing civil monetary penalties, the ALJ must consider six statutory penalty criteria: the operator’s history of violations, its size, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff’d*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion “bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act’s penalty scheme.” *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence. While the mine had no roof control plan violations in the fifteen months preceding this violation, it had a number of other roof control violations. Ex. 2. Mach is a large coal mine operator. The penalty as proposed will not affect its ability to continue in business, and it demonstrated good faith in abating the citation. The parties agree that the violation is significant and substantial, and therefore the violation is a serious one. In addition, an uncontested imminent danger order was issued with this citation, further indicating the seriousness of the violation. The violation was the result of moderate negligence. I find that a penalty of \$3,784.00 is appropriate.

## III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$3,784.00 for Citation No. 9031549. The remaining citations are addressed in a separate order approving partial settlement. Mach is **ORDERED** to pay the Secretary of Labor the sum of \$3,784.00 within 30 days of the date of this decision for the violation at issue here.

  
Margaret A. Miller  
Administrative Law Judge

Distribution: (U.S. First Class Mail)

Christopher M. Smith, U.S. Department of Labor, Office of the Solicitor, 211 7th Avenue North,  
Suite 420, Nashville, Tennessee 37219

Christopher Pence, Hardy Pence, PLLC, 500 Lee Street, East, Suite 701, P.O. Box 2458,  
Charleston, WV 25301